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September 16, 1997

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

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SEP 16 1997

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: MM Docket No. 97-122; File Nos. BRFT-970129YC, BRFT-970129YD

Dear Mr. Caton:

Transmitted herewith, on behalf of Gerard A. Turro, are an original and fourteen copies of his Supplement to Petition for Special Authority to Take the Deposition of Serge Loginow, Jr. in the above-referenced proceeding.

In the event there are any questions concerning this matter, please communicate with this office.

Very truly yours,



Charles R. Naftalin

Enclosures

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DOCKET FILE COPY ORIGINAL

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In re )  
)  
GERARD A. TURRO )  
)  
For Renewal of License )  
For FM Translator Stations )  
W276AQ(FM), Fort Lee, NJ, and )  
W232AL(FM), Pomona, NY )  
)  
MONTICELLO MOUNTAINTOP )  
BROADCASTING, INC. )  
)  
Order to Show Cause Why the )  
Construction Permit for FM Radio )  
Station WJUX(FM), Monticello, NY, )  
Should Not Be Revoked )

MM Docket No. 97-122

File Nos. BRFT-970129YC  
BRFT-970129YD

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SEP 16 1997

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

To: The Commission

**SUPPLEMENT TO PETITION FOR SPECIAL  
AUTHORITY TO TAKE THE DEPOSITION OF SERGE LOGINOW, JR.**

Gerard A. Turro, by his attorneys, hereby submits his Supplement to the Petition for Special Authority to Take the Deposition of Serge Loginow, Jr., filed June 26, 1997, in the above-captioned proceeding.<sup>1</sup>

In this Proceeding, Mr. Turro's license renewal applications have been designated for a hearing to determine if they may be granted.<sup>2</sup> The most important evidence, if any, that Mr.

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<sup>1</sup>The Mass Media Bureau ("Bureau") filed an Opposition to Mr. Turro's Petition on July 3, 1997, and Mr. Turro submitted his Reply to that Opposition on July 16, 1997 and requested expedited action on an emergency basis.

<sup>2</sup>Hearing Designation Order, Order to Show Cause and Notice of Opportunity for Hearing, FCC 97-137 (released April 18, 1997) ("HDO").

Turro may have violated the Commission's Rules is based upon inspections conducted by FCC field engineer, Serge Loginow, Jr. Mr. Turro has requested special authority to take the deposition of Mr. Loginow in order to have a reasonable opportunity to conduct his defense. The Presiding Judge issued an order almost two months ago finding that a deposition of Mr. Loginow is warranted and expressly rejecting opposition by the Bureau.<sup>3</sup>

Continuing developments in the case emphasize the need for an oral deposition of Mr. Loginow. As the discovery deadline of August 22, 1997 approached, Mr. Turro accepted the Bureau's invitation to submit written interrogatories intended to solicit information from Mr. Loginow, and shortly thereafter, Mr. Turro submitted requests for admissions to the Bureau.

The results of the Bureau's interrogatory responses and its admissions demonstrate again that an oral deposition of Mr. Loginow is essential and efficient. In particular, in its admissions

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<sup>3</sup>"Such a finding is warranted here. Specifically, the deposition of Mr. Loginow appears reasonably calculated to lead to the discovery of admissible evidence under Issues 1 through 3 and 5 through 7. See Section 1.311(b) of the Commission's Rules. As noted above, those issues were partially based on the inspections conducted by Mr. Loginow, he is the only Commission staff member with personal knowledge of the facts, and he is a 'possible' Bureau witness. Having conducted the inspections, Mr. Loginow is in a position to testify from personal knowledge about facts which are clearly relevant to those issues." Memorandum Opinion and Order, FCC 97M-112 (released June 23, 1997), para. 6.

In rejecting the Bureau's opposition to our request for this finding, the Judge found that:

"The Bureau's objections to the taking of Mr. Loginow's deposition are rejected. While written interrogatories are extremely useful and practical in determining the identity of those Commission employees having personal knowledge of a particular matter, Turro has already discovered that information. Further, the subject matter of the proposed deposition, Mr. Loginow's inspections and his personal observations, does not appear to be easily susceptible to written questions and answers. Rather, those matters would be most efficiently and expeditiously addressed in the give-and-take of oral testimony which will allow for immediate follow-up questioning... Under these circumstances, it is believed that it would be appropriate to allow the oral deposition of Mr. Loginow to be taken." Id., para. 7.

responses, the Bureau has not accepted the plain meanings of relevant prior written statements of Mr. Loginow and it has expressly taken the position that it is not responsible for his knowledge.<sup>4</sup>

The recent Bureau admissions patently contradict the prior, and contemporaneous, written reports of Mr. Loginow, the FCC's field engineer who conducted the investigations in this Proceeding. The Bureau has represented that Mr. Loginow is the only member of the Commission's staff who has personal knowledge of the facts, so the recent contradictions of his 1995 reports are unexplained.

In addition, in response to many of Mr. Turro's admissions requests, which are based upon Mr. Loginow's written reports, the Bureau has responded "Unknown to the Bureau." Typical of such failures to respond, when Mr. Turro sought a simple admission concerning Mr. Loginow's knowledge concerning radio filters he described in one of his written reports he sent to the Bureau in 1995 immediately after inspecting Mr. Turro's stations, the Bureau responded:

"32. Neither admit nor deny. The Bureau has no such first-hand knowledge. The Bureau has no knowledge whether Loginow has such knowledge."

At all times relevant, Mr. Loginow was an FCC employee, he conducted his various inspections and monitoring as part of his employment at the direction of the Bureau, and he reported to the Bureau about them. To date, Mr. Turro's only opportunity to discover information concerning Mr. Loginow is to go through the Bureau, and yet the Bureau has attempted to curtail such discovery by the simple expedient of refraining from seeking the

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<sup>4</sup>Attached hereto is a copy of the Motion to Compel and for Related Relief, filed September 12, 1997, which was directed to the Bureau's admissions. We provide it to the Commission so that a more complete explanation of the discovery failures faced by Mr. Turro is available.

answers from Mr. Loginow and being able to say that it does not know the answers known only to Mr. Loginow.

These failures, and others which are described in the Motion which is attached hereto, have prejudiced Mr. Turro's discovery rights throughout the Proceeding. The Bureau has not conducted discovery in a way which makes information from Mr. Loginow forthcoming, clearly demonstrating the futility of seeking information concerning Mr. Loginow on paper from the Bureau rather than in a deposition of Mr. Loginow directly.

Recently, the sudden illness of a party caused the Presiding Judge to delay the commencement of the hearing from October 14, 1997, to December 2, 1997.<sup>5</sup> This provides a brief, new, window of opportunity in which the Commission may help to mitigate the unfairness to which Mr. Turro has been subjected by accepting the finding of the Presiding Judge and granting special authority to take the oral deposition of Serge Loginow, Jr.

Respectfully submitted,

GERARD A. TURRO

*Alan Y. Naftalin (by CRN)*  
By: /s/ Alan Y. Naftalin

*Charles R. Naftalin*  
By: /s/ Charles R. Naftalin  
/s/ Charles R. Naftalin

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September 16, 1997

His Attorneys

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<sup>5</sup>Order, FCC 97M-150 (released September 5, 1997).

**Before the**  
**FEDERAL COMMUNICATIONS COMMISSION**  
**Washington, D.C. 20554**

In re	)	
	)	
GERARD A. TURRO	)	MM Docket No. 97-122
	)	
For Renewal of License	)	File Nos. BRFT-970129YC
For FM Translator Stations	)	BRFT-970129YD
W276AQ(FM), Fort Lee, NJ, and	)	
W232AL(FM), Pomona, NY	)	
	)	
MONTICELLO MOUNTAINTOP	)	
BROADCASTING, INC.	)	
	)	
Order to Show Cause Why the	)	
Construction Permit for FM Radio	)	
Station WJUX(FM), Monticello, NY,	)	
Should Not Be Revoked	)	
	)	
To: Honorable Arthur I. Steinberg		
Administrative Law Judge		

**MOTION TO COMPEL AND FOR RELATED RELIEF**

GERARD A. TURRO

Alan Y. Naftalin  
Charles R. Naftalin

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September 12, 1997

His Attorneys

## SUMMARY

This Motion demonstrates that the Bureau should be directed to correct many of its Admissions, or disclose the factual basis for them, because they patently contradict the prior, and contemporaneous, written reports of Serge Loginow, Jr., the FCC's field engineer who conducted the investigations in this Proceeding. The Bureau has represented that Mr. Loginow is the only member of the Commission's staff who has personal knowledge of the facts, so the contradictions of his reports must be corrected or explained.

In addition, in response to many of Mr. Turro's admissions requests, which are based upon Mr. Loginow's written reports, the Bureau has responded "Unknown to the Bureau." Typical of such failures to respond, when Mr. Turro sought a simple admission concerning Mr. Loginow's knowledge concerning radio filters he described in one of his written reports he sent to the Bureau in 1995, the Bureau responded:

"32. Neither admit nor deny. The Bureau has no such first-hand knowledge. The Bureau has no knowledge whether Loginow has such knowledge."

At all times relevant, Mr. Loginow was an FCC employee, he conducted his various inspections and monitoring as part of his employment at the direction of the Bureau, and he reported to the Bureau about them. To date, Mr. Turro's only opportunity to discover information concerning Mr. Loginow is to go through the Bureau, and yet the Bureau attempts to curtail such discovery by the simple expedient of refraining from seeking the answers from Mr. Loginow and being able to say that it does not know the answers known only to Mr. Loginow.

These failures, and others described in the Motion, have prejudiced Mr. Turro's discovery rights throughout the Proceeding. This Motion should be granted to help return some measure of fairness to this Proceeding and to assist in compiling a complete and efficient hearing record.

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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In re	)	
	)	
GERARD A. TURRO	)	MM Docket No. 97-122
	)	
For Renewal of License	)	File Nos. BRFT-970129YC
For FM Translator Stations	)	BRFT-970129YD
W276AQ(FM), Fort Lee, NJ, and	)	
W232AL(FM), Pomona, NY	)	
	)	
MONTICELLO MOUNTAINTOP	)	
BROADCASTING, INC.	)	
	)	
Order to Show Cause Why the	)	
Construction Permit for FM Radio	)	
Station WJUX(FM), Monticello, NY,	)	
Should Not Be Revoked	)	

To: Honorable Arthur I. Steinberg  
Administrative Law Judge

**MOTION TO COMPEL AND FOR RELATED RELIEF**

Gerard A. Turro, by his attorneys, hereby submits his Motion to Compel and for Related Relief ("Motion") directed to the Response of Mass Media Bureau to Gerard A. Turro's Request for Admissions of Fact and Genuineness of Documents dated September 5, 1997 ("Admissions") in the above-captioned proceeding.

As demonstrated below, the Bureau must be ordered to correct or explain many of its Admissions responses because they patently contradict the prior, and contemporaneous, written reports of the Commission's only witness with personal knowledge, field engineer Serge Loginow, Jr. Other responses appear to rely on facts not in the record, and still other responses concerning Mr. Loginow are qualified with "Unknown to the Bureau," even though Mr. Loginow

is an FCC employee, conducted his investigations under the Bureau's direction, and has been under the Bureau's sole control throughout this Proceeding.<sup>1</sup>

I. The Bureau has repudiated prior statements of Mr. Loginow without explanation

A. Requests for admissions 6-9 and 11

Consistent with several prior representations, the Bureau has admitted that Mr. Loginow is the only member of the Commission's staff with personal knowledge of matters related to the Proceeding. (Admissions, p. 2) This establishes that no other member of the Commission's staff has personal knowledge of matters related to the Proceeding.<sup>2</sup> However, at several points the Bureau's Admissions contradict Mr. Loginow's written statements which have been produced.

In Mr. Loginow's Radio Station Inspection Report produced by the Bureau on July 8,

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<sup>1</sup>In his several discovery requests to the Bureau in this proceeding, including the Request for Admissions to the Bureau, the term "Proceeding" has been used as a defined term, as follows: "'Proceeding,' for purposes of these interrogatories, shall mean the FCC's MM Docket No. 97-122, File No. BRFT-970129YC, File No. BRFT-970129YD, Hearing Designation Order, Order to Show Cause and Notice of Opportunity for Hearing, FCC 97-137 (released April 18, 1997) ("HDO"), and all matters referred to therein, including matters which preceded issuance of the HDO and initiation of MM Docket No. 97-122, File No. BRFT-970129YC and File No. BRFT-970129YD, including but not limited to any complaints or investigations concerning Mr. Turro and/or the broadcast stations of which he is the licensee and/or FM radio station WJUX, Monticello, New York, formerly WXTM (the "Monticello Station")." Request for Admissions, pp. 2-3.

<sup>2</sup>In our Motion to Compel dated September 2, 1997 (p. 9), we questioned the basis for members of the Commission's staff Alan Aronowitz and Suzan Friedman to be supporting several Bureau discovery responses with their own sworn declarations that the responses are "true and correct" based upon their "knowledge and belief" when the Bureau has represented that no staff members other than Mr. Loginow have personal knowledge of the facts of this Proceeding, and we understand that neither Ms. Friedman or Mr. Aronowitz have the authority to speak for the Bureau, as would a Bureau Chief, for example. The Admissions are again supported by the declaration of Mr. Aronowitz. We repeat that concern here because the Bureau has not yet responded to this issue raised in our September 2, 1997 motion.

1997, in response to our three Freedom of Information Act requests ("Loginow Report"), Mr.

Loginow stated that during his April 13 and 14, 1995 inspections:

Jukebox Radio — STL WMG499

The transmitting antenna for the STL was observed to be in a southerly direction, within a few degrees of the direction of the translator W276AQ in Fort Lee, NJ. The STL transmitter was active at the time of the inspection, however, the translator at Fort Lee was determined to be receiving programming off the air from the translator at Pomona NY operating on 94.3 MHz. The Pomona NY translator was determined to be receiving programming from WXTM on 99.7 MHz. Although the quality of the audio at Pomona and Fort Lee was degraded due to splatter from WBAI (in New York NY on 99.5 MHz), Turro stated that the condition was due to the WXTM transmitter operating at reduced power due to a recent lightning strike. The inspecting engineer had observed that the operating power at WXTM was reduced.

Based upon the Loginow Report Mr. Turro sought the following admission:

6. On April 13 and/or 14, 1995, Mr. Loginow determined that while WMG499 was transmitting between the Jukebox Radio studios in Dumont, New Jersey and W276AQ, Fort Lee, New Jersey (the "Fort Lee translator"), the Fort Lee translator was receiving Jukebox Radio programming off the air from W232AL, Pomona, New York (the "Pomona translator") and that the Pomona translator was receiving Jukebox Radio programming off the air from the Monticello Station.

The Bureau responded (Admissions, p. 2):

6. Deny. Loginow made no observations regarding WMG-499 on April 13 and/or 14, 1997.<sup>3</sup> Loginow's observations regarding the operation of WMG-499, made on May 15, 1997, as well as all other investigations and/or testing and/or observations made by Mr. Loginow known to the Bureau, are disclosed and described in the Answers of Loginow to Turro's Interrogatories, submitted on August 20, 1997.

The Loginow Report explicitly states that during the April 13 and 14, 1995 inspections, Mr. Loginow "observed" WMG499 and that it was "active at the time of the inspection." In

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<sup>3</sup>We assume that the two references here to dates in 1997 were erroneous and that the Bureau intended to state 1995. However, given the recent disclosure in Bureau interrogatories dated August 20, 1997, of a June 4, 1997, inspection by Mr. Loginow, the Bureau should be required to correct this admission or disclose all information relevant to what, otherwise, are two new and undisclosed inspections.

addition, the Loginow Report specifically stated: "the translator at Fort Lee **"was determined** to receiving programming off the air from the translator at Pomona NY operating on 94.3 MHz.

The Pomona NY translator **was determined** to be receiving programming from WXTM on 99.7 MHz." (Emphasis added) In an e-mail authored by Mr. Loginow on August 1, 1995, Mr.

Loginow reported that:

The audio quality of Fort Lee via off air means had been observed during April 1995 when WXTM Monticello and Jukebox Radio was inspected.<sup>4</sup>

The Bureau should be directed to correct its Admission 6 by a simple response of Admit, or it should be required to disclose and explain the factual basis for a denial which flatly contradicts the express observations and determinations in the written report of Mr. Loginow, reputedly the only person with personal knowledge of the subject.

This and many other unexplained contradictions of the record infect the Bureau's subsequent admissions. Based on the Loginow Report and his e-mail Mr. Turro sought:

7. Mr. Loginow's determinations described in Admission 6 established that on April 13 and/or 14, 1995 the Fort Lee translator was receiving the signal of the Pomona translator "directly through space" as that term is used in Section 74.1231(b) of the Commission's Rules, 47 CFR Section 74.1231(b).

8. Mr. Loginow's determinations described in Admission 6 established that on April 13 and/or 14, 1995 the Pomona translator was receiving the signal of the Monticello Station "directly through space" as that term is used in Section 74.1231(b) of the Commission's Rules, 47 CFR Section 74.1231(b).

9. Mr. Loginow's determinations described in Admission 6 established that on April 13 and/or 14, 1995, the Fort Lee translator and the Pomona translator were operating in compliance with Section 74.1231(b) of the Commission's Rules, 47 CFR Section 74.1231(b).

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<sup>4</sup>E-mail message from Serge Loginow to S. Barone, dated August 1, 1995, produced as an attachment to Mass Media Bureau's Second Supplemental Answers to Interrogatories of Gerard A. Turro, dated August 5, 1997.

To each the Bureau responded (Admissions, pp. 7-8):

7. Deny. Loginow did not test or conclude whether the Ft. Lee translator was receiving the signal of the Pomona translator “directly through space” on April 13 or 14, 1995. He was able to determine that when the Monticello transmitter was apparently turned off, neither translator broadcast the over-the-air signal of the Monticello station.

8. Deny. See response 7.

9. Deny. See response 7.

The Bureau’s admissions clearly fail to reconcile Mr. Loginow’s own contemporaneous statements that he **determined** that the Fort Lee translator was receiving programming **off the air** and that he **observed the audio quality of Fort Lee via off air means**. Mr. Turro’s requests expressly sought admissions from the Bureau concerning Mr. Loginow’s determinations. Unless there is another person with personal knowledge of the matter, which the Bureau has specifically denied, then these observations and determinations must be admitted. By its own representations, the Bureau lacks any factual basis to support its denials. Therefore, to deny the existence of Mr. Loginow’s observations and determinations is unjustified, or at a minimum, requires a disclosure of the factual support for denials which directly contradict the Loginow Report.<sup>5</sup> And as the Bureau admits elsewhere, Mr. Loginow’s inspections of April 13 and 14, 1995, “contributed to the allegations in the *HDO*.” (Admissions, p. 7)

In the same admission requests, Mr. Turro sought admissions that each of the translators

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<sup>5</sup>In the Bureau’s most recent interrogatory answers, dated August 20, 1997, Loginow/Bureau stated explicitly that for the April 14, 1995 inspection, Mr. Loginow was ...“to test whether the Ft. Lee and Pomona translators were receiving the over-the-air signal of WXTM...” (Loginow/Bureau answers, p. 5) Mr. Loginow says that he set out to test whether Mr. Turro’s translators were receiving their signals “over-the-air” and his Report stated that he “determined” that they were, in fact, so receiving.

were receiving signals "directly through space" as understood in Section 74.1231(b) of the Commission's Rules. The Bureau has denied these admissions. The Bureau should be directed to explain its basis for, apparently, erecting some artificial distinction between Mr. Loginow's determinations that the translators were receiving programming "off the air" and admissions that the programming was received "directly through space." We find no distinction between the phrases "over the air" and "directly through space," but if the Bureau has one, it should explain it.

Mr. Turro sought the following admission:

11. On April 13 and/or 14, 1995, Mr. Loginow observed that the Monticello Station was operating with reduced power.

To which the Bureau responded:

11. Deny. As recounted in the Answers of Loginow to Turro's interrogatories, submitted on August 20, 1997, Loginow did not personally observe that the Monticello station was operating at reduced power. Rather, Turro stated to Loginow that the Monticello station was operating at reduced power.

This denial also directly contradicts the Loginow Report which, as noted above, stated:

"The inspecting engineer had observed that the operating power at WXTM was reduced." The interrogatory responses of Loginow/Bureau dated August 20, 1997, do not contradict the Loginow Report when it stated Mr. Loginow's own observation, the interrogatory response merely fails to address the subject. The Bureau should be directed to correct its denial to Admission 11 to a simple admit, or to disclose and explain fully the basis for contradicting the express statement in the Loginow Report that he (the "inspecting engineer") personally observed

that WXTM was operating at reduced power.<sup>6</sup>

B. Requests for admissions 34-37

In August, 1997, the Bureau produced copies of two e-mail messages written by Mr. Loginow and sent to Stephen Barone.<sup>7</sup> The first, dated August 1, 1995, states:

Gerard Turro Update

On site monitoring in area of Jukebox Radio studio in Dumont NJ on July 31, 1995. The STL (WMG499) was not observed to be in operation on 951.00 MHz, or any frequency near 951.00 MHz.

The audio quality of the Fort Lee translator signal, however, indicated that the input signal was NOT off the air from the Pomona NY translator on 94.3 MHz as the licensee Gerard Turro claims, but rather from alternate means, presumably via telephone lines. (The audio quality of Fort Lee via off air means had been observed during April 1995 when WXTM Monticello and Jukebox Radio was inspected.)

The second e-mail sent by Mr. Loginow to Mr. Barone, dated August 4, 1995, states:

Gerard Turro Update # 2

On site monitoring in area of the Fort Lee NJ translator on August 2, 1995. The audio quality appeared to be very high. It was particularly free of sideband splatter from adjacent FM stations as was observed previously. Telephoned Turro and asked for an inspection of the Fort Lee Translator. He replied no problem, he can be there in about twenty minutes. Turro arrived and demonstrated off air reception of the Pomona NY translator (94.3 MHz) by deactivating the receiver and observing the loss of audio output from the translator. He offered to make a similar demonstration at the Pomona NY translator with the engineer. Turro and Loginow went to Pomona NY. The output of the translator there was deactivated and again the Fort Lee translator was observed to lose audio output. Turro had installed filters at Pomona to greatly improve the reception of WJUX Monticello NY.

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<sup>6</sup>Shortly thereafter, WXTM changed its call sign to WJUX. Under either call sign, it is the "Monticello Station" at issue in this Proceeding.

<sup>7</sup>Copies of both e-mail messages were attached to Mass Media Bureau's Second Supplemental Answers to Interrogatories of Gerard A. Turro, dated August 5, 1997.

It appears that Turro is now able to provide a consistent high quality audio signal off the air from the Pomona NY translator at the Fort Lee NJ location.

Furthermore, while at Fort Lee, Turro demonstrated the ability to receive moderately good audio directly from WJUX Monticello (99.7 MHz). Again, he was using filters similar to those he installed at Pomona NY. Turro said he plans to fine tune the equipment to further improve the Monticello signal quality and then permanently connect it as part of the translator station.

In the light of those e-mail messages, and using language from them, Mr. Turro sought the following admissions:

34. On August 2, 1995, Mr. Loginow observed no programming delivery mechanism in use at either the Fort Lee translator or at the Pomona translator other than reception of signals directly off the air, with the Fort Lee translator receiving Jukebox Radio programming off the air from the Pomona translator and that the Pomona translator receiving Jukebox Radio programming off the air from the Monticello Station.

35. Mr. Loginow determined that on August 2, 1995 the Fort Lee translator was receiving the signal of the Pomona translator "directly through space" as that term is used in Section 74.1231(b) of the Commission's Rules, 47 CFR Section 74.1231(b).

36. Mr. Loginow determined that on August 2, 1995 the Pomona translator was receiving the signal of the Monticello Station "directly through space" as that term is used in Section 74.1231(b) of the Commission's Rules, 47 CFR Section 74.1231(b).

37. Mr. Loginow determined that on August 2, 1995, the Fort Lee translator and the Pomona translator were operating in compliance with Section 74.1231(b) of the Commission's Rules, 47 CFR Section 74.1231(b).

The Bureau responded (Admissions, pp. 6-7):

34. Neither admit nor deny. Loginow's observations regarding the equipment he saw at the Pomona and Ft. Lee translators on August 2, 1995, are disclosed and described in the Answers of Loginow to Turro's Interrogatories, submitted on August 20, 1997.<sup>8</sup> It is

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<sup>8</sup>That interrogatory response was: "August 2, 1995: I called Turro and informed him that I wished to inspect the Ft. Lee and Pomona translators. I met Turro at the Ft. Lee translator. I inspected the W276AQ equipment, did not observe any remote control equipment, and found a high-quality Sony car radio tuned to the Pomona translator's frequency, which audio was being fed into the transmitter. Turro and I then drove to the Pomona facility, where I found essentially



unclear what is meant by "program delivery mechanism" in this context. Loginow did observe a receiver in Ft. Lee tuned to the Pomona frequency and a receiver in Pomona tuned to the Monticello facility. However, it appears that Loginow did not test whether the Ft. Lee translator received Jukebox Radio programming off the air from the Pomona translator and that the Pomona translator received Jukebox Radio programming off the air from the Monticello station, and he made no conclusions in that regard.

35. Deny. Loginow did not test whether the Ft. Lee translator was receiving the signal of the Pomona translator "directly through space," and he made no conclusions in that regard. Loginow did observe a receiver in Ft. Lee tuned to the Pomona frequency.

36. Deny. Loginow did not test whether the Pomona translator was receiving the signal of the Ft. Lee translator "directly through space," and he made no conclusions in that regard. Loginow did observe a receiver in Pomona tuned to the Monticello station.

37. Deny. Loginow did not test that the Ft. Lee and Pomona translators were operating in compliance with Section 74.1231(b) of the Commission's Rules, and he made no conclusions in that regard. Loginow did observe a receiver in Ft. Lee tuned to the Pomona frequency and a receiver in Pomona tuned to the Monticello facility.

These responses squarely contradict the e-mail reports of Mr. Loginow quoted above, even though those e-mail messages were explicitly authenticated in the Bureau's interrogatory response. The term "program delivery mechanism" which the Bureau finds "unclear" is based upon Mr. Loginow's first e-mail message in which he theorizes (without actually observing the station's facilities) that "signal input" at the Fort Lee translator was "not off the air" but was from "alternate means." It is for this reason that we sought an admission that, when Mr. Loginow actually did examine the Fort Lee facilities two days later, he observed no programming delivery mechanism other than reception of signals directly over the air. As the

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the same equipment (with the car radio tuned to WXTM's frequency) and high-quality filters which were installed to receive a better signal quality from the Monticello station.

I then returned to my office and reduced my observations to an e-mail which was directed to both the Wireless Telecommunications and Mass Media Bureau personnel, a copy of which is disclosed herein. There are no other written records of this investigation."

second e-mail message makes clear, Mr. Loginow did not observe any "alternate means" of signal reception in use at either translator. The Bureau should be directed either to correct its admission to reflect the substance of Mr. Loginow's e-mail reports, including the fact that he never observed an "alternate means" of program delivery to the translator, or explain the basis for refuting them in interrogatory answers written more than two years later.

The Bureau also contends that "...it appears that Loginow did not test whether the Ft. Lee translator received Jukebox Radio programming off the air from the Pomona translator and that the Pomona translator received Jukebox Radio programming off the air from the Monticello station, and he made no conclusions in that regard." (Admissions, p. 6) Again, Mr. Loginow's contemporaneous e-mail report is entirely inconsistent. Mr. Loginow explicitly described the "demonstration" conducted at both translator stations by turning off the radio receivers and observing loss of translator audio output. Mr. Loginow concluded that the Fort Lee translator was able to receive "...a consistent high quality audio signal off air from the Pomona NY translator..." Mr. Loginow also concluded that the Fort Lee translator could "...receive moderately good audio directly from WJUX Monticello..."

The Bureau's response clearly contradicts Mr. Loginow's contemporaneous e-mail reports. The Bureau should be directed to correct its admissions or clarify the factual basis for a substantial refutation of Mr. Loginow's contemporaneous reports.

II. The Bureau has not disclosed the basis for its  
claim that Mr. Turro "was on notice" of a complaint

Mr. Turro sought admissions from the Bureau that he was not provided timely notice of Universal's February 15, 1995 complaint:

48. At the request of Universal, the Commission did not provide Mr. Turro with notice of the February 15, 1995, complaint filed by Universal.

49. At the request of Universal, the Commission attempted to keep Universal's February 15, 1995 complaint confidential.

53. The Commission did not direct notice to Mr. Turro of Universal's February 15, 1995 complaint until after the release of the HDO.

The Bureau responded (Admissions, pp. 8-9):

48. Neither admit nor deny. Universal requested that its identity be kept confidential. Consistent with standard practice, Turro was not initially provided a copy of the complaint when it was filed. However, Turro was on notice of a complaint on June 21, 1995.

49. See response 48.

53. Deny. Turro was on notice of a complaint on June 21, 1995. See response 48.

The Bureau has not identified the basis for its claim that Mr. Turro was "on notice" of the Universal complaint. If it has such a basis it should be disclosed. In connection with the Proceeding, by a letter dated June 21, 1995, Norman Goldstein of the Commission's staff sent an inquiry to Mr. Turro the first sentence of which states:

The Commission recently received information that raises serious questions concerning the operation of Translator Stations W276AQ, Ft. Lee, NJ, W232AL, Pomona, NY and Aural Inter City Relay Station WMG-499, Dumont, NJ.

At no place in that letter is the term "complaint" used or is Universal identified. If the Bureau claims that this inquiry constituted notice of the Universal complaint, it should so explain. Otherwise, the Bureau should admit that it did not direct notice of that complaint to Mr. Turro until after release of the HDO.

III. The Bureau has not fulfilled its obligations with  
respect to disclosure of "knowledge" under its control

Scattered throughout the Bureau's Admissions are the disclaimer: "Unknown to the Bureau" when admissions are sought concerning the knowledge of Mr. Loginow, a member of the Commission's staff. The Bureau so disclaims in Admissions: 14, 16, 17, 20, 21, 22, 23, 24, 27, 28, and 46:

14. However, it is unknown to the Bureau whether Loginow was on the top floor of the building.

16. Unknown to the Bureau. The "specific" location of the Ft. Lee translator's equipment on May 15, 1995, was not relevant to the testing conducted and described in the Answers of Loginow to Turro's Interrogatories, submitted August 20, 1997.

17. See response 16.

20, 22, 23, 24. Unknown to the Bureau. Any conclusions formed by Loginow regarding operation of the Ft. Lee station based on his observations are disclosed and described in the Answers of Loginow to Turro's Interrogatories, submitted August 20, 1997.

27, 28. Unknown to the Bureau. Any conclusions formed by Loginow regarding operation of the Ft. Lee station based on his observations are disclosed and described in the Answers of Loginow to Turro's Interrogatories, submitted August 20, 1997, with respect to Loginow's observations on August 2, 1995.

46. Unknown to the Bureau. However, it appears that Loginow made no notes during the course of his activities on August 2, 1995, as set forth in Answers of Loginow to Turro's Interrogatories, submitted August 20, 1997.

Similarly, in Admissions 3 and 6, the Bureau qualifies representations about Mr.

Loginow's activities which are "known to the Bureau." In Admission 32, the Bureau responds:

32. Neither admit nor deny. The Bureau has no such first-hand knowledge. The Bureau has no knowledge whether Loginow has such knowledge.<sup>9</sup>

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<sup>9</sup>This responded to the following request for admission: "32. Mr. Loginow and/or the Bureau have no knowledge of when the filters Mr. Loginow observed on August 2, 1995 were

All of these requests for admission sought to clarify and complete the record concerning the actions, observations and conclusions of Mr. Loginow.<sup>10</sup> The reports of Mr. Loginow which have been produced were the foundations for these requests. Given the documentary evidence of Mr. Loginow's actions, observations and conclusions available, and that the Bureau represents that it has no source of information other than Mr. Loginow, the Bureau should have admitted to all of these requests. Each request for admission is simple, direct, and based upon Mr. Loginow's own written reports.

Mr. Loginow is a member of the Commission's staff, assertedly the only person with personal knowledge of the facts at issue, and so far as we know he conducted all of his inspections, monitoring, testing, and observations of Mr. Turro's stations during the course of his employment by the Commission. Indeed, the Bureau itself initiated Mr. Loginow's inspections or monitoring in April and May, 1995, and June, 1997, and certainly was a participant in the inspections of July and August, 1995. Mr. Loginow stated that he reported to the Bureau concerning the results of his July and August, 1995, inspections or monitoring.<sup>11</sup>

At all times relevant, Mr. Loginow has been an employee of the Commission. He is not an independent party or a third party witness. He was, and is, under the control of the Bureau

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installed."

<sup>10</sup>In denying the Bureau's Motion to Strike and ordering it to respond to these requests for admissions, the Presiding Judge found that: "...the Bureau's responses to the requests for admissions will serve to expedite and simplify the hearing in this proceeding by allowing the parties to stipulate to the greatest extent possible to facts which are uncontested." Memorandum Opinion and Order, FCC 97M-143 (released August 27, 1997).

<sup>11</sup>Loginow/Bureau Interrogatory Answers, pp. 8-9.

and reported to the Bureau. The Bureau is responsible for his knowledge. Moreover, the Bureau is the only party to the Proceeding with access to Mr. Loginow.

To date, Mr. Turro has been precluded from taking Mr. Loginow's deposition because he is a member of the Commission's staff and special authority to do so must be granted by the Commission. The Bureau has opposed the issuance of such special permission. Written interrogatories have been the only method available to Mr. Turro to obtain information from or about Mr. Loginow and to test his knowledge.

Therefore, it is improper and obstructive for the Bureau to erect a distinction between what is "known to the Bureau" and what is "known to Mr. Loginow." Because Mr. Loginow's knowledge is under the Bureau's control, and he is the Bureau's witness, such "knowledge" is one and the same. The Bureau is simultaneously taking the positions that: (a) we should not be permitted to depose Mr. Loginow, and (b) we should be permitted only to submit written questions to discover information concerning him, but (c) the Bureau is free to place itself in the position of keeping information from counsel to Mr. Turro by the simple expedient of refraining from seeking the answers from Mr. Loginow and being able to say that it does not know the answers known only to Mr. Loginow. In short, the Bureau has curtailed Mr. Turro's discovery rights by failing to comply with its obligations as a responsible party to this Proceeding by producing timely all requested information known to an employee/witness under its control.

Therefore, the Bureau should be ordered to amend its responses to admissions requests 3, 6, 14, 16, 17, 20, 21, 22, 23, 24, 27, 28, 32 and 46 so that it becomes responsible for all of Mr. Loginow's knowledge by expressly admitting or denying Mr. Turro's requests without qualification.

#### IV. Conclusion

The Bureau's conduct during discovery in this Proceeding has prejudiced Mr. Turro's opportunity to a fair hearing. Mr. Turro submitted interrogatories to the Bureau on May 23, 1997. The Bureau consumed almost all of the authorized discovery period partially responding to them. The Bureau spread out its answers across four different sets of interrogatory answers over the course of more than two and a half months attempting to answer that single initial set of interrogatories.<sup>12</sup> With no material exception, every single interrogatory answer provided by the Bureau during those months disclosed information which had been available to the Bureau, and had been under its control, before June 6, 1997, when it submitted its first set of answers.<sup>13</sup> But without reasonable justification offered, the Bureau spread out its answers through August 13, 1997.

The weight of the evidence rested upon Mr. Loginow's activities in 1995, which were known to the Bureau in 1995, but disclosure of their substance was delayed into July and August, 1997, long after the first set of Bureau answers dated June 6, 1997. Even the June 4, 1997, inspection or monitoring conducted by Mr. Loginow, which took place and was reported to the

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<sup>12</sup>See Mass Media Bureau's Answers to Interrogatories of Gerard A. Turro, dated June 6, 1997.

Mass Media Bureau's Supplemental Answers to Interrogatories of Gerard A. Turro, dated June 23, 1997.

Mass Media Bureau's Second Supplemental Answers to Interrogatories of Gerard A. Turro, dated August 5, 1997.

Mass Media Bureau's Third Supplemental Answers to Interrogatories of Gerard A. Turro, dated August 13, 1997.

<sup>13</sup>The only exception is the Statement of Jay Epstein, which was dated August 1, 1997, and which the Bureau has represented will not be used by it in the hearing.

Bureau two days before the Bureau's first set of answers, was not disclosed until August 20, 1997,<sup>14</sup> two days before the discovery cut-off.

With our request to the Commission for special authority to depose Mr. Loginow pending, and opposed by the Bureau, on August 8, 1997, we accepted the Bureau's invitation to submit written interrogatories directed to him. As we noted in that submission (p. 2), those interrogatories were substantially the same as those which had been submitted initially on May 23, 1997. The Bureau provided answers dated August 20, 1997, constituting its fifth set of answers, all of which properly should have been provided as part of the first set of answers nearly three months earlier because the information disclosed had been available to the Bureau when it submitted its first answers on June 6, 1997.<sup>15</sup>

The prejudicial effects of this conduct by the Bureau are significant. Mr. Turro has been put to unreasonable effort and expense to review long drawn out serial responses which should have been provided initially. Mr. Turro has been forced to request and require discovery from the Bureau at every stage, including now three different motions to compel, which have been necessary to force appropriate responses from the Bureau and to bring a semblance of clarity or consistency to the record. Mr. Turro is a private citizen attempting to operate a small business. He can ill afford to be ground down by the resources available to the federal government. The Bureau's actions against Mr. Turro clearly have been prompted by the secret urgings of Mr.

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<sup>14</sup>Loginow/Bureau Interrogatory answers, dated August 20, 1997, pp. 9-10.

<sup>15</sup>Pending is Mr. Turro's Motion to Compel directed at the August 20, 1997 answers, which attempts, in part, to have the Bureau correct the numerous inconsistencies it has created in the record.



Turro's wealthy competitor, Universal Broadcasting of New York, Inc.

By failing to provide discovery responses on a timely basis, the Bureau inappropriately impeded Mr. Turro's legitimate discovery opportunities. For example, the two e-mail reports Mr. Loginow provided to the Bureau in August 1995, and the substance of the Loginow/Bureau interrogatory answers, also available to the Bureau since 1995, should have been provided early in June, 1997, in response to our initial interrogatories. If the Bureau had disclosed those matters at the time it should have, they would have been available to Mr. Turro's counsel prior to the depositions taken of adverse witnesses, and could have guided questioning. Production of documents under the Freedom of Information Act were similarly tardy.<sup>16</sup>

The Bureau's Admissions which are the subject of this Motion follow much the same pattern of delay and failure to respond fully. They are incomplete, non-responsive and fail to recognize what little information had been produced previously by the Bureau. Accordingly, the Bureau should be ordered to correct and explain its Admissions so that as clear a record as

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<sup>16</sup>On May 27, 1997, pursuant to Section 0.461 of the Commission's Rules, counsel to Mr. Turro submitted a Freedom of Information Act ("FOIA") request to the Commission's Managing Director to obtain documents related to the Proceeding. Counsel supplemented that FOIA request on June 10, 1997, and June 25, 1997. All three FOIA letters were served on the Presiding Judge and the parties. Under Section 0.461, the Commission should have responded to the initial FOIA request within ten working days, or by June 10, and if it encountered enumerated difficulties, then a FOIA response was required by June 25, 1997. In its first two sets of interrogatory answers, the Bureau failed to identify documents and claimed that they were subject to FOIA. Finally, by a letter dated July 8, 1997, approximately two weeks after the due date for a response required under Section 0.461 of the Commission's Rules, the Chief of the Mass Media Bureau released certain documents having found that they did not "warrant withholding" under FOIA. Presumably, a several week delay in producing them also was not warranted, and no explanation of the delay was offered in the record.